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NTSB Order No. EA-3648

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of August, 1992

JOHN M. SMITH, Applicant, v. THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Respondent.	)	Docket 70-EAJA-SE-9242

OPINION AND ORDER

The Administrator has appealed from the written initial decision[1] issued by Administrative Law Judge Joyce Capps on February 28, 1990, granting the application for attorney fees and other expenses under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (EAJA) and the Board's Rules implementing that act, 49 C.F.R. Part 826. In her decision, the law judge

[1]A copy of the initial decision and order granting the EAJA award is attached.

determined that the Administrator was not substantially justified in bringing an action against the applicant. For reasons set forth below, we grant the appeal.

At the initial hearing, the Administrator attempted to prove that on October 1, 1987, applicant violated sections 91.75(a) and (b), 91.9, and 61.3(c) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Parts 91 and 61).[2] On the aforementioned date, applicant acted as pilot-in-command of a Beech Bonanza, M-35, N9708R, that allegedly deviated from its

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[2]Sections 91.75(a), (b), and 91.9 (now 91.123(a), (b), and 91.13, respectively) read, in pertinent part at the time of the incident:

"§ 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance. ... If a pilot is uncertain of the meaning of an ATC clearance, he shall immediately request clarification from ATC.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction."

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

§ 61.3 Requirement for certificates, rating, and authorizations.

* * *

(c) Medical certificate. Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under part 67 of this chapter."

assigned altitude without first receiving an amended clearance. A loss of separation resulted between applicant's aircraft and another aircraft. The two air traffic controllers on duty at the time of the incident, a trainee and his supervisor, testified that they noticed N9708R had descended to approximately 5,200 feet from the assigned altitude of 8,000 feet. They further stated that they informed applicant no such clearance had been issued by anyone at their control facility. At the time of the incident and throughout the ensuing proceedings, applicant contended that he had received an instruction to descend to 4,000 feet and was in the process of complying with this direction when one controller, after urgently demanding to know what respondent was doing, instructed him to maintain 5,000 feet. There was no tape recording available to settle the discrepancy, as the equipment used to record the radar controller's communications had malfunctioned. The manual controller's communications, which included some, but not all, of the radar controller's communications, however, was available. This reproduction was incomplete because the radar controller's statements were blocked out whenever the manual controller happened to be speaking at the same time.

On October 13, 1988, the law judge determined that the Administrator did not prove the violations of FAR sections 91.75(a), (b), and 91.9 by a preponderance of the evidence.[3]

[3]At the hearing, applicant made a motion for a directed verdict at the close of the Administrator's case. The law judge denied the motion.

Although the Administrator originally filed an appeal from the initial decision, it was later withdrawn. Subsequently, the law judge granted applicant's request for attorney fees and costs under the EAJA in the amount of $ 20,562.02, finding that the Administrator had not been substantially justified in pursuing the 91.75(a), (b), and 91.9 violations against Mr. Smith. She determined that the controllers had not testified truthfully, believing that they had cleared applicant's aircraft to descend to 4,000 feet. The law judge further concluded the Administrator should have recognized that the controllers "reported a deviation in order to cover up the trainee's error." EAJA Decision at 5. On appeal, the Administrator asserts there was substantial justification for the action taken.

The EAJA requires a government agency to pay attorney fees and other costs to a prevailing applicant unless the government can prove that its position was substantially justified or that special circumstances make an award of fees unjust. 5 U.S.C. § 504(a)(1). The Supreme Court, in Pierce v. Underwood, 487 U.S. 552, 565 (1988), found this standard to be "justified to a degree that could satisfy a reasonable person," or reasonable in law and fact.

As we have outlined in the past, the government must show the following to prove substantial justification: "(1) that there is a reasonable basis in truth for the facts alleged in the pleadings; (2) that there exists a reasonable basis in law for the theory it [the Government] propounds; and (3) that the facts

alleged will reasonably support the legal theory advanced." McCrary v. Administrator, 5 NTSB 1235, 1238 (1986), quoting United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir. 1985). See also Hampton v. Administrator, NTSB Order No. EA-3557 (1992); C&M Airways v. Administrator, NTSB Order No. EA-3332 (1991).

In the instant case, applicant attempts to advance the argument that the Administrator must be found to have acted "slightly more than reasonably," as detailed in the House Committee Report regarding the 1985 reenactment of the EAJA,[4] in order to support a finding of substantial justification. The Supreme Court, however, in Pierce v. Underwood, supra, refused to find controlling the language of the House Committee Report. The Court noted that at the time of the report's issuance, 12 Circuits out of 13 "contradicted the interpretation endorsed in the Committee Report." 487 U.S. at 567. Congressional intent was not clear enough, in the Court's view, to support a standard as "unadministerable" as the "more than mere reasonableness" test. Id. at 568. Instead, the Court espoused the requirement of reasonable in law and fact.[5]

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[4]The report stated that, "[s]everal courts have held correctly that `substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of `reasonably justified' in favor of `substantially justified,' the test must be more than mere reasonableness." HR Rep. No. 99-120 at 9 (1985) (footnote omitted).

[5]The Court reasoned that its interpretation would not judicially transform the standard from substantially justified to reasonably justified because "a position can be justified even though it is not correct, and we believe it can be substantially

Applying this standard in the instant case, we must determine whether the Administrator's decision to pursue the charges against applicant was reasonable in both law and fact at each step of the proceedings. Alphin v. National Transportation Safety Board, 839 F.2d 817 (D.C. Cir. 1988). Applicant argues that, since "Judge Capps found that the FAA employees were lying," it is impossible to now find that the Administrator was substantially justified. The law judge noted that, although her decision to believe applicant over the controllers alone is not enough to find a lack of substantial justification, "the Administrator's agents prior to trial must have heard the same story from the controllers as I did and should have been able to evaluate that testimony as being contrived to justify the erroneous and dangerous clearance to 4,000 feet when there was another aircraft in the vicinity." EAJA Decision at 6.[6] We believe, however, that the Administrator acted properly in

(..continued)
(i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." 487 U.S. at 566, n.2.

[6]The law judge stated:

> "[T]aken in combination with the controllers' appearance in the taping room right after the incident, the fact that the radar tape was nothing but static, the belligerent and unprofessional tenor of [the supervising controller's] communications with the applicant all lead to the obvious and ineluctable conclusion that they were trying to cover their tracks by constructing a scenario that would point away from any wrongdoing on their part in giving the 4,000 foot amended clearance. The Administrator's agents should have also picked up on this early on in their investigation and realized that something was `wrong in Denmark.'" EAJA Decision at 5.

pursuing this case as one that turned ultimately on witness credibility. The Administrator does not have to prove that he had a substantial probability of prevailing. Application of Wendler, 4 NTSB 718, 720 (1983). Of course, the charges must be well-founded, but that requirement is inherent in the standard of reasonable in law and fact.

It was not disputed that applicant's aircraft descended from the original clearance of 8,000 feet. The vital question was whether it had been cleared to do so by ATC. Although the Administrator did not have the radar controller's tapes, he had the testimony and written statements of two air traffic controllers, a partial transcript of the controllers' conversations, and applicant's admission that he did descend to 5,000 feet. Simply because the law judge found applicant's testimony more credible does not, ipso facto, mean that the controllers' testimony was inherently incredible. It was reasonable for the Administrator to found his case on the available evidence and attempt to persuade the law judge that the controllers' statements were worthy of belief.

After reviewing the entire administrative record, we find that the Administrator was substantially justified in pursuing the alleged FAR violations against applicant. The Administrator may rely on the reasonable testimony of FAA employees and the truthfulness of such testimony unless given clear indication to the contrary. No evidence has been presented in this case that would either compel the Administrator to doubt the veracity of

the controllers' testimony, or suggest that the recording had been tampered with, and counsel for the Administrator had no reason to believe the controllers were being less than truthful in their testimony.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The law judge's decision and order is reversed; and
3. The application for attorney fees and other expenses under the provisions of the Equal Access to Justice Act is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.